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IN THE

Supreme Court of the United States

October Term, 1974
No. .....

STEPHAN RIESS and THELMA MCKINNEY RIESS,
Petitioners,

vs.

JOHN D. MURCHISON and C. W. MURCHISON, JR., Executors of the Will of C. W. Murchison, Deceased, and THE SIMI VALLEY DEVELOPMENT COMPANY, a corporation,
Respondents.

Response to Petition for a Writ of Certiorari.

Respondents John D. Murchison and C. W. Murchison, Jr., Executors of the Will of C. W. Murchison, Deceased, and Simi Valley Development Company respectfully submit this brief in opposition to the petition filed by Stephan Riess and Thelma McKinney Riess for review of a decision of the Court of Appeals for the Ninth Circuit affirming in part and reversing in part a judgment in favor of petitioners.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 503 F.2d 999. The unpublished opinion of the District Court is set forth in Appendix "B" to the Petition.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether the Court of Appeals properly ordered a remand of the case for determination of damages in accordance with a formula established by the evidence presented.

Statutes and Rules Involved.

The provisions of 28 U.S.C., Sections 2106 and 2072 and Rule 52(a) of the Federal Rules of Civil Procedure are set forth in the Petition at pages 3-4.

Statement.

This action, which has encompassed more than fifteen years of litigation, arises from a dispute between the purchasers and sellers of certain parcels of real property located in Simi Valley, California. Pursuant to the terms of a written agreement entered into in 1956, respondents acquired from petitioners property consisting of a water well site (the "water lands") and a number of subdivided lots. The purchase price for this property comprised initial fixed payments totalling $98,000 together with stock in respondent Simi Valley Development Company and subsequent payments, to a maximum purchase price of up to $1 million, of ten cents per 1,000 gallons of water actually produced, saved and sold from the water lands. If during any year the amount payable under this formula was less than $24,000, petitioners were entitled to take the difference in water at the rate of twenty cents per 1,000 gallons. This agreement also provided that respondents were to build a reservoir and pipelines from the water

lands to certain residential lands owned by respondents if, as petitioners had represented, the water lands were able to produce sufficient water adequately to service those lands. Disputes on this issue were expressly made subject to arbitration.

Respondents commenced performance under the contract and conducted tests of the wells located on the water lands. These tests revealed that there was inadequate water to service the development of respondents' residential properties, and petitioners were so informed. Respondents offered to modify the contract to accommodate this circumstance, to compromise by building a limited pipeline system or to submit the matter to arbitration pursuant to the agreement. Petitioners declined to accept any of these alternatives and on October 8, 1958 commenced this action for breach of contract.

Respondents immediately sought to stay proceedings pending arbitration on the issue of the production capacity of the water lands but their motions to this end were denied. The case proceeded to trial in April, 1962 and a judgment for damages of $47,865 was entered based upon a stipulation as to water production. Appeals were taken by all parties and in a decision reported at 329 F.2d 635 (9th Cir. 1964), the Court of Appeals reversed in part and remanded to the District Court for determination as to the propriety of arbitration on the issue of the production capacity of the water lands. Petitioners sought a writ of certiorari which was denied by this Court on March 21, 1966 (383 U.S. 946).

In April, 1966 the District Court stayed further proceedings pending arbitration and, at petitioners' request, certified this order for an immediate appeal. This appeal was permitted by the Court of Appeals and, by an

opinion reported at 384 F.2d 727 (9th Cir. 1967), that Court affirmed the order of the District Court.

The arbitration commenced in December, 1969 before a panel of three experts, one designated by each of the parties and one, a retired judge, chosen as a neutral arbitrator and referee. Ten days of evidentiary hearings on the capacity of the water lands and related matters ensued. These hearings involved both testimony by percipient and expert witnesses and presentation of substantial documentary evidence. Written briefs were submitted by both sides. Upon completion of the arbitration, the arbitrators filed a report in which they unanimously concluded that the water on the water lands did not meet the contractual criteria and set forth the basis for that determination in considerable detail. In September, 1970 the District Court accepted this report and confirmed the arbitration award in its entirety.

In September, 1971 further trial proceedings commenced and in May, 1972 the District Court entered judgment in favor of petitioners for the maximum possible contract price ($1 million less credits of $108,000) plus interest.

The Court of Appeals for the Ninth Circuit, in an opinion by Judge Snead set forth at 503 F.2d 999, affirmed the judgment in favor of petitioners but reversed as to the damages found by the District Court. The Court of Appeals remanded with an order to enter judgment in an amount to be determined in accordance with a formula set forth in its opinion. Thereafter the Court of Appeals denied petitioners' application for a rehearing and their further petition to recall the mandate.

REASONS FOR DENYING THE WRIT.

The issue in the present action, even as viewed by petitioners, is narrow and unique to the circumstances of the case. It simply cannot be contorted into one warranting review by this Court on certiorari.

Petitioners do not contend that the Court of Appeals erred in reversing the District Court's assessment of damages. Rather they object to the fact that the District Court has been ordered upon remand to apply the proper measure of damages, in accordance with the agreement of the parties and the findings of the arbitrators. Petitioners urge that after more than fifteen years of litigation the Court of Appeals should have ordered yet another round of combat, involving further "percipient and expert witnesses," briefs and arguments, although the record before that Court clearly demonstrated that all of the available evidence bearing on damages had been adduced, argued, considered by a panel of appointed experts and accepted by the District Court. There is simply no rational basis for such a procedure and the Court of Appeals was not obliged to order it.

The decision of the Court of Appeals was manifestly correct. There is no conflict of decision on this issue and there is clearly no important question of federal law requiring decision by this Court.

I

The Decision Below Is Correct.

After determining that the District Court had erred in its construction of the agreement between the parties and that its assessment of damages had been founded upon that erroneous construction, the Court of Appeals remanded with instructions to the District Court to compute damages based upon the production figures and related data contained in the findings of the arbitrators. Petitioners contend that the Court of Appeals should have instead ordered a hearing *de novo* on the issue of damages, inferring that no evidence as to damages was ever adduced at trial. This is clearly incorrect.

Petitioners' entitlement to damages in this action arose from a finding by the District Court, affirmed by the Court of Appeals, of breach of contract, to wit, the failure to pay petitioners for water produced, saved and sold from the water lands. In addition, the Court of Appeals affirmed petitioners' entitlement to damages for years in which water was not actually produced (after the wells on the water lands had been shut down). For determination of those damages, it would be necessary to refer to the maximum possible production capacity of the water lands.

Both the actual and potential production of the water lands were the subject of the arbitration which took place in this action. The panel of arbitrators, composed of a retired judge and two civil engineers with specialized experience in the areas of hydraulic engineering and geology, was required to determine whether those water lands were able to produce continuously

sufficient quantities of water to meet a minimum standard, which it found to be 1,750,000 gallons per day.

To determine this issue the arbitrators necessarily had to determine the production capacity of the water lands over a period of twenty years. Their analysis was founded upon actual production figures, testimony of witnesses ranging from geologists to well drillers, investigations into the geological structure of the water lands and surrounding areas and the results of tests which had been conducted over a span of years on the wells located on those lands. Testimony was adduced through examination and cross-examination of witnesses and documentary evidence was received through the introduction of exhibits. Based upon the evidence thus presented, and upon extensive briefs submitted by the parties, the arbitrators unanimously concluded that the water lands were incapable of producing water in sufficient quantities to meet the requisite 1,750,000 gallon per day figure. In so concluding, the arbitrators further stated their determination of the actual production capacity of the water lands: after exhaustion of water then contained in an underground reservoir (which exhaustion would occur in approximately five years), the maximum constant production capacity, as a "safe business computation" would not exceed 150 gallons per minute in the opinion of two of the three arbitrators.

It was this finding to which the Court of Appeals quite properly directed the District Court for its computation of damages. For the first five years (1958-1963), production would be calculated at 300 gallons per minute and thereafter, the reservoir having been exhausted, production would be based upon the 150 gallon per minute figure.

Petitioners contend that this determination by the Court of Appeals was based "on the unsworn opinion of one of the three arbitrators, none of whom was subject to cross-examination" [Petition, pp. 15-16]. They thus dismiss the arbitrators as mere witnesses, a truly astounding conclusion. The arbitrators' function, as petitioners well know, was to act as triers of fact, and their findings were properly relied upon by both the District Court and the Court of Appeals. Such a procedure is neither novel nor improper.

> "[T]he rule is well established that a finding by referee, trial court or administrative board if supported by substantial evidence should be accepted by an appellate reviewing court."
>
> *Foote Bros. Gear & Machine Corporation v. National Labor Relations Board*, 114 F.2d 611, 621 (7th Cir. 1940), *reversed* on other grounds 311 U.S. 620 (1941).

Arbitration proceedings, as other forms of fact finding, are governed by a "clearly erroneous" test and are subject to limited review. *Federal Commerce & Navigation Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 389 (2d Cir., 1972); *South East Atlantic Shipping, Ltd. v. Garnac Grain Company*, 356 F.2d 189, 191-192 (2d Cir., 1966). The Court of Appeals thus properly regarded the information contained in the report of the arbitrators as "evidence properly before us" [503 F.2d at 1014].

While we have found no case specifically on point, there is ample authority to support the use of detailed directions upon a reversal as to damages. Thus, for example, Judge Kaufman of the Court of Appeals for the Second Circuit noted in *Fuchstadt v. United States*, 442 F.2d 400, 402 (2d Cir. 1971):

> ". . . the district court failed to comply with the mandate of the earlier panel decision of this court, requesting Judge Cannella to isolate the portion of Fuchstadt's medical expenses attributable to his cholecystitis and gall bladder operation. Since it would be extraordinarily wasteful of our judicial resources to remand this case to the district court for a second time, we feel compelled to make the allocation which the district judge should have made. . . ."

Specific modification of damages is also found in the Ninth Circuit in *United States National Bank v. Fabri-Value Company*, 235 F.2d 565, 568-569 (9th Cir. 1956).

The remand in the case at bar did not deny petitioners the opportunity to present their case to a trier of fact. They have not been prevented from introducing all possible evidence on the issue of production from water lands (which is synonymous with the issue of damages) nor have they been denied the right (which they in fact exercised vigorously) to cross-examine respondents' witnesses on this issue. In short, they have in this instance, as throughout the sixteen years of this litigation, been afforded every substantive and procedural protection to which they are entitled under the Seventh Amendment to the Constitution and the statutes which they cite. Their contentions are thus devoid of factual foundation and are manifestly without legal merit.

II

Neither a Conflict of Decision nor an Important Question of Federal Law Appears in Respect to the Issues Presented.

Petitioners seek to give import to the limited issues they raise by urging the existence of an "apparent conflict" among the circuits on the right of an appellate court to make findings of fact [Petition, p. 15]. This assertion is based upon a mischaracterization of the record for the Court of Appeals did not itself make findings but rather directed the District Court to base its award of damages upon the facts previously determined by the panel of arbitrators. The ALR commentary which petitioners cite in support of their position does not contain any reference to a conflict which bears upon the issues at bar.

There is no dispute here as to the applicability of the "clearly erroneous" test contained in Rule 52(a) of the *Federal Rules of Civil Procedure*. The Court of Appeals has held that the District Court erroneously construed the contract which is the subject of this action and that its assessment of damages, founded upon that construction, was therefore likewise erroneous. Petitioners do not contest that ruling. Thus in its present posture this action pertains solely to the question of the amount of damages to which petitioners are entitled. The ruling of the Court of Appeals, if applied by the District Court, would entitle petitioners to damages (by their own estimate as of January 1, 1975) of $321,361.45. Petitioners seek application of a formula which would entitle them to $546,714.05 or an

alternative formula which would result in a judgment of $952,133.16. Neither formula finds support in the record.

This Court has often noted that it does not grant certiorari to review disputes over evidence or specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). In this instance, petitioners are asking for a review of the propriety, and more precisely the form, of the Court of Appeals' remand. They cite no authorities which deal directly with this subject for the obvious reason that it has never been considered one of sufficient controversy or magnitude to warrant review by the Courts of Appeal, much less by this Court.

It was precisely this kind of issue to which Mr. Justice Frankfurter had reference in his dissenting opinion in *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 455-456 (1959):

> "If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for a trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved in an appraisal of the fair inferences to be drawn from the evidence."

Conclusion.

For the reasons stated, petitioners have failed to demonstrate the necessity for or propriety of issuance of a writ of certiorari and the petition should be denied.

Respectfully submitted,

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